Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

JOHN RATELLE, Warden; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, *Petitioners*,

v.

TONY PROTOPAPPAS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

[Filed June 12, 2000]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TONY PROTOPAPPAS,	No. 96-55979
Petitioner-Appellant,	D.C. No. CV-95 04362-ABC
v.	
JOHN RATELLE, Warden; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,	MEMORANDUM[1]
Respondent-Appelles.	

Appeal from the United States District Court
for the Central District of California
Audrey B. Collins, District Judge, Presiding

Argued and Submitted April 6, 2000
Pasadena, California

Before: HUG, Chief Judge, THOMPSON, Circuit Judge, and RESTANI, Court of International Trade Judge[2]

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1. This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Circuit Rule 36-3.

2. Honorable Jane A. Restani, Judge, United States Court of

Tony Protopappas appeals the district court's denial of his federal petition for writ of habeas corpus. Protopappas contends the district court erred in finding that the California Supreme Court's 1995 denial of his state habeas petition served as a procedural bar to federal habeas review. We have jurisdiction pursuant to 28 U.S.C. § 2253, and we reverse and remand.

On July 31, 1984, a jury convicted Protopappas of second degree murder. After the California Court of Appeal affirmed Protopappas's conviction, the California Supreme Court denied his petition for review on July 20, 1988. On January 6, 1994, Protopappas filed his first state habeas petition, which the California Supreme Court denied. On December 22, 1994, Protopappas filed a second state habeas petition restating his previously denied claim as well as forty-seven new claims. The California Supreme Court denied the second petition on May 24, 1995 in a one sentence order: "Petition for writ or habeas corpus DENIED on the merits and for lack of diligence."

Protopappas then filed a federal habeas petition, which included all forty-eight claims, in the United States District Court for the Central District of California. The district court denied the petition, finding the California Supreme Court's denial to be based on independent and adequate state grounds. Protopappas appeals the district court's denial of his forty-seven new claims but does not appeal the denial of his original claim included in his first state habeas petition.

We review de novo the district court's denial of a petition for writ of habeas corpus based on the ground of state procedural default. See Park v. California, 202 F.3d 1146, 1149 (9th Cir. 2000). Federal courts may not "review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate

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International Trade, sitting by designation.

to support the judgment." Coleman v. Thompson, 501 U.S. 722, 729 (1991). "In order to constitute adequate and independent grounds sufficient to support a finding of procedural default, a state rule must be clear, consistently applied, and well-established at the time of the petitioner's purported default." Wells v. Maass, 28 F.3d 1005, 1010 (9th Cir. 1994).

The California Supreme Court's citation of "lack of diligence" refers to the untimeliness bar because of Protopappas's delay of approximately five years between his direct appeal and his state habeas corpus petition. See In re Robbins, 959 P.2d 311, 340, n. 34 (Cal.1998). In a recently decided case, La Crosse v. Kernan, No. 97-55085, 2000 WL 432414, at *1 (9th Cir. Apr. 24, 2000), we addressed an identically worded California Supreme Court habeas denial and concluded that, as of April 1996, the California Supreme Court had failed to make clear that its denials based on untimeliness did not rest on questions of federal constitutional law. See id. at *4. The California Supreme Court's 1995 denial of Protopappas's petition, therefore lacks the requisite independent and adequate state ground to bar federal review. See id.

We therefore reverse the district court's denial of Protopappas's habeas petition and remand to the district court for further proceedings.

REVERSED and REMANDED.